(3)

No. 06-595

In The

Supreme Court of the United States

TYLER CHASE HARPER, ET AL.,

Petitioners,

v.

POWAY UNIFIED SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF LIBERTY LEGAL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Liberty Legal Institute ("Institute") is a non-profit law firm dedicated to the preservation of first amendment rights. The Institute has appeared before this Court and federal appellate and district courts numerous times in numerous cases. In its commitment to the protection of expressive freedom and the religious liberty of all faiths, the Institute represents individuals and institutions nationwide. As a result, the Institute has represented and currently represents students in numerous cases involving governmental actions by school districts. *Tinker*[2] is often the only protection for the Institute's clients, whether the student is simply expressing a different idea or the student is sharing his or her religious faith with friends.

The decision below does great damage to the interests of *Amicus* and to the clients it represents nationwide. The Ninth Circuit decision not only creates a conflict in the circuits, but turns *Tinker* on its head and eviscerates its protections by allowing the government to now ban student ideas or speech with which it disagrees.

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation and submission of this brief.

[2] *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

SUMMARY OF ARGUMENT

The Ninth Circuit decision below strikes at the very heart of *Tinker*. It will create problems throughout lower courts nationwide in an area of law, heretofore, remarkably clear for decades, and will lead to great confusion. Under *Tinker*[3] and *Bethel Sch. Dist. v. Fraser*[4], a school district may only ban speech if that speech is causing a material or substantial disruption, it is lewd, obscene or vulgar, or the speech violates the rights of others by falling into one of the limited unprotected categories of speech listed in *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992). Speech short of these limitations cannot be restricted, even if the school district does not like the message being expressed or even if a majority of students do not like the message.

Our free society is willing to tolerate speech, beliefs and ideas which are repugnant to many or even all others except the speaker. The reason is obvious: one day one of us may be that speaker and our opinion may be equally offensive to the vast majority of others. From the abolitionist living in Savannah, Georgia in 1855, to the civil rights leader in 1955 Mississippi, to the student in West Virginia in 1943 who refused to say the Pledge of Allegiance, there has been and will always be voices among us who are at odds with the official government message. It is incumbent upon this Court to act as the guardian against government oppression of ideas with which the government disagrees.

This case is not just important because there is an obvious circuit split or because a wrong must be righted.

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[3] *Id.*

[4] 478 U.S. 675 (1986).

This case is important because the Ninth Circuit, the designated guardian of the right to peacefully dissent, created new law eviscerating *Tinker* and justifying government censorship because it also disagreed with the ideas being expressed. The decision cracks a fundamental pillar of First Amendment law, in fact, of American jurisprudence. The government may not set up a debate, take sides, and then punish those who express an opposing message. *Certiorari* should be granted.

ARGUMENT AND AUTHORITIES

I. The Ninth Circuit misapplied the "interference with the rights of others" guideline from *Tinker*.

The case below strikes at the very core of *Tinker*, will create problems nationwide in an area of, heretofore, remarkable clarity, and will result in great confusion throughout all lower courts. There are clearly defined limitations within which the government may regulate the content of speech because of its effect on the hearer or observer. These limitations, identified in *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992), include obscenity, defamation and "fighting words." *See Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire*, 314 U.S. 568, 572 (1942) ("fighting words"). These three cases have one thing in common. They were decided prior to *Tinker*.

It is impossible to conceive that *Tinker*, in articulating the "material and substantial disruption" standard, intended to swallow the protection the Court afforded

student speech by unconsciously inserting what amounts to a heckler's veto. In fact, the Ninth Circuit's decision below, which reinterprets "interference with the rights of others" to allow censorship of student speech which might connect to another person's identity, would directly gut *Tinker*. Does anyone truly believe that children in families with military servicemen in *Tinker* did not feel a connection and even personally attacked by the black arm bands worn against their parents and relatives? Of course. Yet, the speech was still protected, even though it offended. The rationale of the decision below would literally gut *Tinker* itself and overturn decades of precedent. *Tinker* never sanctioned punishing speech because it offended others.

The "material and substantial disruption" standard may be seen as a summation or articulation of long established free speech jurisprudence. Speech may not be regulated unless it is causing harms unrelated to the message itself. Therefore, through the prism of *Tinker* and free speech cases upholding state regulation just a short time prior to *Tinker*, *Bethel Sch. Dist. v. Fraser*, involving obscene references and disruption, may be seen as a mere affirmation of these pre-existing constitutional norms. The school must simply show up to court with objective evidence of a reasonable forecast of material and substantial disruption or obscenity, fighting words, defamatory words or speech that is, in the normal course of constitutional jurisprudence, deemed of lesser value because of its non-communicative harms.

There are two approaches to achieving tolerance. One is to allow all sides to speak, to teach everyone to respect different ideas, and to treat one another with grace, even if you strongly disagree with their ideas or worldview. A

second approach is to ban dissenting ideas so no one feels challenged or offended and thus tension is avoided. The latter approach is repugnant in American law. The latter approach strikes at the core of *Tinker*. The latter approach is the decision below. The government may not set up a debate, take sides, and then ban those with different beliefs from responding.

II. The government cannot take sides in a debate by censoring all speech with which it disagrees.

A central theme of all First Amendment jurisprudence is whether the government regulation under review is an attempt to suppress a message because of the message and who is the messenger. To expose unlawful content-based policies and practices, an inquiry must be made into the legitimacy of the government's justifications furthered by the speech regulations. Disagreement with the message is obviously content-based, as are regulations which have no non-communicative conduct purposes. The Court has stated that "[t]he principal inquiry in determining content neutrality, in speech cases generally . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys," and if so, strict scrutiny applies. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984).

First Amendment law both before and since *United States v. O'Brien* 391 U.S. 367 (1968), contains at its core the elemental proposition that an intent to stifle a message

because of disagreement with it simply cannot be reconciled with the Constitution.[5] According to O'Brien, the

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[5] *See, e.g., Texas v. Johnson*, 491 U.S. 397, 413 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (same); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (refusing to allow a public figure to maintain a cause of action for intentional infliction of emotional distress arising from a vulgar satire); *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *Perry Educ. Assoc. v. Perry Local Educators' Ass'n et al.*, 460 U.S. 37, 46 (1983) ("the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view"); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65, 67-68 (1976); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976); *Grayned v. City of Rockford*, 48 U.S. 104, 115 (1972); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Brown v. Louisiana*, 383 U.S. 131, 142-43 (1966); *Stromberg v. California*, 283 U.S. 359, 368-69 (1931); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (City cannot deny Jehovah's Witnesses permit to use a city park for Bible talks when other religious and political groups had been allowed to use the park for similar purposes); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (same); *Student Coalition for Peace v. Lower Merior Sch. Dist.*, 776 F.2d 431, 437 (3rd Cir. 1985) ("Viewpoint discrimination...is impermissible regardless of the nature of the forum."); *Baugh v. Judicial Inquiry and Review Comm'n*, 907 F.2d 440, 443-44 (4th Cir. 1990) ("Viewpoint-neutrality is concerned with limitations of speech on the basis of the viewpoint expressed and 'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.' ").

actions of Defendants must be "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377 (emphasis added).

A core principle of the First Amendment is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). The Court has reiterated this principle on so many occasions, often in lengthy and eloquent statements, that it requires no extended analysis.[6] Moreover, the First Amendment not only prohibits the government from favoring one viewpoint over another, but also prohibits the government from seeking to avoid public controversy by banning speech on an entire subject – *i.e.*, "religious"[7] – and prohibits the government from granting a monopoly to one side of an issue.[8] As the Court has stated: "To permit

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[6] *See, e.g., Hudgens v. N.L.R.B.*, 424 U.S. 507, 520 (1976); *NAACP v. Button*, 371 U.S. 415, 444-45 (1963); *Carey v. Brown*, 447 U.S. 455 (1980); *Thomas v. Collins*, 323 U.S. 516, 537 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535-37 (1980).

[7] *Widmar v. Vincent*, 454 U.S. 263, 269-270 (1981) (*citing Carey*, 447 U.S. at 464-465) (absolutely forbids the government from engaging in viewpoint censorship); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

[8] *See, e.g., Johnson*, 491 U.S. at 413; *United States v. Eichman*, 496 U.S. 310 (1990) (same); *Cornelius*, 473 U.S. at 806; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. at 804 ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *Bolger*, 463 U.S. at 72; *Carey*, 447 U.S. at 462-63; *Pacifica Found.*, 438 U.S. at 745-46; *American Mini Theatres, Inc.*, 427 U.S. at 63-65, 67-68; *Buckley*, 424 U.S. at 16-17; *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Mosley*, 408 U.S. at 95; *Bachellar*, 397 U.S. at 567; *Brown*, 383 U.S. at 142-43; *Stromberg*, 283

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one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees." *City of Madison v. Wisconsin Employment Relations Committee*, 429 U.S. 167, 175-76 (1976). Clear legal precedent holds that religious speech viewpoint discrimination is an impermissible violation of the Speech Clause of the First Amendment. *Rosenberger*, 515 U.S. at 828; *Good News Club*, 533 U.S. at 111-12; *Lamb's Chapel*, 508 U.S. 384 (1993); *The Bronx Household of Faith v. Board of Education*, 331 F.3d 342, 345-46 (2nd Cir. 2003); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 561 (7th Cir. 2001); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1281 (10th Cir. 1996).

In Poway Unified School District ("Poway"), the government allowed the debate. Then, it took sides. Then it banned anyone from responding. Worse than that, it punished a student for presenting an opposing belief. Nothing could be more repugnant under First Amendment jurisprudence. This is not to say Poway could not have positioned itself better for outsiders in banning Harper's speech. Poway could have banned all speech on the subject of homosexuality. While *amicus* believes such a position would still be in conflict with *Tinker* and bedrock constitutional jurisprudence, since speech is protected absent a material and substantial disruption, banning all speech on the subject would have at least had the imprimatur of fairness to the casual observer. One wonders if the school district or the Ninth Circuit gave any consideration to how some students and parents may have felt seeing tax

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U.S. at 368-69; *Niemotko v. Maryland*, 340 U.S. 268 (1951); and, *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

dollars and precious education time being spent on promoting beliefs and conduct with which they fundamentally disagree. In any event, Poway chose to ban only one side of the debate. Such a decision is fundamentally at odds with longstanding constitutional jurisprudence, and certainly even the most casual observer would perceive the Orwellian quality of Poway's censorship.

III. For Poway to institute such a broad and sweeping prior restraint on speech, it must meet its governmental burden of proving the ban is the least restrictive means with an extensive legislative fact-finding record.

Poway bears a heavy burden to uphold its prior restraint scheme on speech it disapproves. The Court has stated that "[a]ny system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Poway "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (emphasis added). The Court has noted that "[t]he thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Thus, the Court observed, it is "clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it." *Id.* at 561. The Supreme Court has tended to recognize only a narrow number of situations in which prior restraints might be permissible. *See Southeastern*

Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975) ("In order to be held lawful, [a prior restraint], first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints").

In order for Poway to justify its censorship, it cannot rely upon "undifferentiated fear or apprehension." *Tinker*, 393 U.S. at 508. Under *Tinker*, Poway needs hard objective evidence forecasting disruption because of non-disruptive student speech, especially speech of students such as the Harpers who are of or near the legal age to vote or put their life on the line on the battlefields of Iraq. The students of Poway deserve at least the same level of constitutional protection afforded commercial purveyors of pornography.

When regulating pornographic speech, the government must develop an extensive record to justify such sweeping prohibitions on speech. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822 (2000) (holding that "[n]o support for the restriction . . . in the near barren legislative record relevant to this provision" is fatal to the Government's case), contrast *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 187 (1997) (reviewing "a record of tens of thousands of pages' of evidence" developed through "three years of pre-enactment hearings, . . . as well as additional expert submissions, sworn declarations and testimony, and industry documents" in support of complex must-carry provisions). Anecdotal evidence and conclusory statements will not suffice. *See Playboy*, 529 U.S. at 822 ("the Government must present more than anecdote and supposition"); *see Sable Comm. of California v. FCC*, 492 U.S. 115, 129-30 (1989) ("[A]side from conclusory statements during the debates by proponents of the bill . . . the congressional

record presented to us contains no evidence of *how* effective or ineffective the . . . regulations were or might prove to be." (footnote omitted)).

Thus, in this case, Poway may only present evidence it considered during its board meeting when it adopted the prior restraint speech policies to demonstrate how these incredibly broad policies are absolutely necessary to prevent an imminent material and substantial disruption. In addition, this evidence must be extremely extensive. Neither the court of appeals below, nor Poway, is able to point to any evidence considered at the time the school board adopted the policies at issue to support their sweeping prohibitions on speech. Therefore, Poway must be enjoined and the Ninth Circuit reversed.

CONCLUSION

The decision below eviscerates this Court's holding in *Tinker* and decades of case law, strikes against the most fundamental freedom of every citizen against government censorship, and is supported by no evidence. *Certiorari* should be granted.

Respectfully submitted,

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